IN THE

Supreme Court of the United States

October Term 1977

No. 77-546

MILTON SILVERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LLOYD A. HALE
Counsel for Petitioner
109 Orchard Terrace
Piermont, New York 10968

October 11, 1977

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Milton Silverman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 31, 1977, in this proceeding.

Opinions Below

The opinion of the Court of Appeals, reprinted in the Appendix hereto, is reported at 556 F.2d 655. The two opinions of the District Court for the Southern District of New York, dated May 15, and July 16, 1976, also reprinted in the Appendix hereto, were not officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on May 31, 1977. A timely petition for rehearing and hearing *en banc* was denied on July 14, 1977. A motion for recon-

sideration of the petition for rehearing, based on germane documents subsequently released by respondent (annexed hereto and discussed hereinafter) was denied on August 30, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether, in a proceeding under 28 U.S.C. Section 2255, respondent may withhold documents in its possession showing knowing prosecutorial use of perjured testimony at the original trial?

2. Whether a petition brought under 28 U.S.C. Section 2255 should be granted, or at least a hearing held, where the petition, detailed supporting affidavits, and other documents, show the original trial was tainted by knowing prosecutorial use of perjury and suppression of exculpatory evidence and respondent does not traverse that showing?

3. Whether, in a 28 U.S.C. Section 2255 proceeding, the District Court may use documents submitted *in camera* by respondent under "a bond of confidentiality" in denying the petition without revealing those documents to the petitioner or holding a hearing?

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

28 U.S.C. Sec. 2255:

> ". . . . Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. . . ."

Statement of the Case

Petitioner, Milton Silverman, instituted a proceeding under 28 U.S.C. Section 2255 to vacate his conviction under indictment 68 Cr. 762(SDNY) on eight counts charging him with violations of 18 U.S.C. Section 664, 29 U.S.C. Sections 439(b) and (c) and Section 501(c). (5,6),* alleging, *inter alia*, the embezzlement of funds of Local 810, International Brotherhood of Teamsters, of which he was then president, in the form of loans and Christmas gratuities, and the falsification of union forms and records to conceal the embezzlement (5,6). After his conviction was affirmed,** petitioner served his sentence of eight months, paid his $8,000 fine, but continued to be prohibited from employment by a union or union welfare or pension plan—his life-long occupation, suffered obloquy in the community (6) and burned with the sense of an injustice done him.

Of particular pertinence to the present proceeding is the conviction under count 18 which charged him with falsification (alteration) of the Local 810 Executive Board minutes, amounting, on the basis of the proof at the trial,

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* References in the form, e.g. "(5,6)" are to the joint appendix on appeal. The issues raised in the present proceeding were not previously available to petitioner on the direct appeal from his conviction 430 F.2d 106 (2d Cir. 1970), cert. den. 402 U.S. 953, reh. den. 403 U.S. 924 (1971) or on his appeal from denial of a new trial, 469 F.2d 1404 (2d Cir. 1972), cert. den. 411 U.S. 982 (1973), (6,24).

** See previous footnote.

to changing the December, 1965, minutes to reflect authorization of a loan and reimbursement of Christmas gratuities to him (8). That charge and the conviction thereon is directly related to all the charges on which petitioner was convicted as a result of count 18's allegation of a general falsification of union records (despite the singular instance in the proof) and the trial court's instruction to the jury that the evidence concerning the falsification of union records should be considered in connection with all the evidence in the case (i.e., evidence of consciousness of guilt) (8).

The perjured testimony knowingly used by the prosecution under count 18 was that of the final witness in the case, Jacob Friedland, who testified for the prosecution on rebuttal. During the investigation of Local 810 which led to petitioner's indictment, the Local was served with a subpoena duces tecum to produce its records before a grand jury in the Southern District of New York (7-8). Friedland, an attorney, was retained by Local 810 to examine those records (Ibid.) and after doing so, prepared a confidential report which stated that the December, 1965, Executive Board minutes did not reflect authorization of payments to Silverman of a loan and reimbursement of Christmas gratuities, which were in fact made (42). However, the Executive Board minutes as produced before the grand jury and the trial jury did reflect authorization of these payments to petitioner (9). See 430 F.2d at 121. Friedland, who resisted testifying at the trial on the attorney-client privilege, which was overruled, and the privilege against self-incrimination, finally testified under a grant of immunity as the final witness at the trial, on the prosecution's rebuttal case. (8, 11-13). He testified that he had no recollection of the original state of the December, 1965, Executive Board minutes nor of any change in them, that he

had "no recollection of the minute books or how they were written", but only by comparing his confidential report with the minutes in the form they were as trial exhibits could he say that there appeared to have been a change to authorize the loan and reimbursement payments to Silverman (8-9; 556 F.2d at 657).

What the prosecutor did not disclose at the trial or thereafter was that he had secured authorization from the Department of Justice for the grant of immunity to Friedland based on his memorandum of March 11, 1969, in which he stated that the crime from which Mr. Friedland was to be immunized was "obstruction of justice on the part of Mr. Friedland in the tampering with the books in question." (See Appendix, *infra*). Petitioner had learned of the existence of this memorandum, but not of its contents or purport through an application under the Freedom of Information Act (5 U.S.C. Sections 552 *et seq*) before the petition was filed but his application for production of the memorandum was denied by the Department of Justice as was expedition of the appeal from that denial (110-11, 135). This memorandum was also sought by motion (18), by subpoena (138A), all of which respondent ignored and the District Court declined to grant or enforce (132, 151-3, 157-8). In fact the memorandum was not produced for petitioner until *after* the petition for rehearing was denied in the Court of Appeals, whereupon petitioner moved to reopen the petition for reargument—and the appeal—(See Appendix, *infra*) on the grounds that the withholding of that memorandum was a further denial of due process to petitioner and a fraud upon the Court of Appeals. (Ibid.) The motion was denied without opinion. (Ibid.)

Two witnesses who could have given the lie to Friedland's testimony were suppressed by the prosecutor's repeated subpoenaing of them before grand juries and

other inquisitorial bodies, threatening them with prosecution, offering them immunity and then withholding it (28, 46). As a result it was not until shortly before the petition was filed that petitioner learned that these witnesses Sophie Oschak, Recording Secretary of the Executive Board, and Max G. Sanchez, Vice-President of Local 810 (25, 44) had themselves actually participated in the change of the Executive Board minutes at the direction of Friedland (26-7, 44-6). As a result of the suppression of these witnesses, petitioner did not learn until about the same time of a third witness, Herman Brickman, who was crucial inasmuch as his representation for independence and integrity as an impartial arbitrator and his lack of association with either Silverman or the union would have insulated him from the attack on his credibility that the prosecutor made on union-oriented witnesses, was also present at the change of the minutes and explained the wholly innocent manner in which the minutes were changed.* (48-50). The affidavits of these three witnesses were annexed to the petition and were in no way contravened by respondent.

The assistant United States attorney who prosecuted petitioner did submit an affidavit "in opposition" to the petition, the only opposing 'factual' showing (90-2). That

* Friedland inquired of Oschak and Sanchez if the Executive Board had in fact authorized the loan and gratuity reimbursement to petitioner. When they informed him it had, he directed the minutes be changed to reflect that fact. Friedland, the attorney retained by Local 810, told Oschak and Sanchez that changing the minutes in the manner he directed was legal, proper and necessary to reflect the action actually taken by the Executive Board (27, 45). Brickman also informed them that such a change was perfectly proper and was of a type often made since union people making minutes were rarely parliamentarians (49). All these witnesses agree that Silverman was not informed of this (27, 47, 49-50). Doubtless Friedland, when himself threatened by the prosecutor with criminal action, became fearful and agreed to testify in the manner he did.

affidavit in no way traversed the sworn statements of Oschak, Sanchez and Brickman but merely states that the assistant did not know what Friedland would say before he testified (91), but as the affidavit also admits that Friedland's testimony as given may have been false (92) surely an insufficient statement in view of the prosecutor's duty to correct false testimony once it is given. At the time the assistant made his affidavit he was evidently unaware that petitioner knew of the existence (but not the contents) of his memorandum to the Department of Justice concerning Friedland's proposed testimony. After petitioner served a subpoena for the memorandum and moved its production, the assistant made no further statements.

In the first opinion denying petitioner relief, the District Court held that the prosecutor had no advance knowledge of Friedland's testimony and that petitioner failed to show that the prosecutor knew that testimony was perjured (122-3). However, the prosecutor's own memorandum which the trial court refused to order produced for petitioner's use, plainly shows that the prosecutor knew what that testimony would be (contrary to his later affidavit) because he plotted it in just the manner it was given and plainly knew that it was false since he sought immunity because of Friedland's involvement in the change of the minutes:

> "3/11/69
>
> From Andy Maloney SDNY 212-264-6427
>
> 1. Jacob Friedland, Esq. (an attorney) in *U.S.* v. *Milton Silverman*
> 591 Summit Avenue
> Jersey City, New Jersey
>
> 2. unknown

3. none (FBI case no. 159-2561)

4. none known

5. no

6. Trial of *U.S.* v. *Milton Silverman,* President Local 810 Teamsters, business manager IBEW, administrator of relative union funds embezzlement 29 U.S.C. 501(c) converting union funds.

7. Document in posession of judge which is a document prepared by Friedland at or about time certain exhibits in evidence in trial were subpoenaed—Mr. Friedland could testify that the crucial pages of the union books are not now in same condition as they were before they were produced before the grand jury and therefore would be crucial to proving that the appearance in the union books as presently indicated is not in fact x exhibits. (converted funds of union to own use)

8. obstruction of justice on the part of Mr. Friedland in the tampering with books in question

9. Both the trial judge and myself believe that one of the crucial questions in the case is whether or not the minute books were tampered with. Mr. Friedland could testify that they are not now in the same condition as before the production to the Grand Jury. The judge is in possession of an attorney-client privilege document which should preclude Friedland from giving a false answer. Milton Silverman is a notorious union racketeer who the Department has been investigating for some 10 years without success . . . this is the closest we have ever come!

10. will testify

NEEDED BY THURSDAY MORNING . . . . March 13, 1969.

[Material excised by government]''

After the petition was denied, petitioner filed a motion under Rule 60(b) F.R.C.P., claiming surprise and unfairness because the subpoena for the memorandum and other evidentiary material was outstanding, as was the application under the Freedom of Information Act, and respondent had refused to honor its commitment to petitioner's counsel to allow inspection of such material in its files, (133-38A, 149-53, 181-2). While the Rule 60(b) motion was *sub-judice,* respondent submitted the above quoted memorandum to the District Judge, *in camera,* under a ''bond of confidentiality'' (176). Despite petitioner's vigorous protest to this procedure (173-5), the District Judge relied upon that memorandum, without disclosing it to petitioner, in reaffirming his denial of the petition, held that all the memorandum indicated was a mere surmise (the basis for which has not been disclosed) of the prosecutor that Friedland was involved in the alteration of the Union books (160-1).

The Court of Appeals held that the District Court's ruling on the Rule 60(b) motion was not appealable 556 F.2d at 656-7. Nonetheless, the Court of Appeals accepted the characterization of the memorandum in the District Court's opinion on that motion: ''No doubt, the prosecutor had his suspicions.'' 556 F.2d at 658. The Court of Appeals, however, did not have the memorandum before it because the District Judge had not forwarded it, under seal or otherwise as part of the record on appeal. (See Paragraph 5 of Motion for Reconsideration, *infra*).

No hearing was ever held.

Petitioner contended and vigorously contends that he was denied due process below as well as at his original trial and that the rulings below violate the standards for the conduct of proceedings under 28 U.S.C. Section 2255 and are contrary to the rulings of this Honorable Court and those of other Circuits.

Reasons for Granting the Writ

1. The decision below approves the denial of access to evidence of knowing prosecutorial use of perjured testimony contrary to the standards of due process, the decisions of this Court and followed by other Circuits.

The Second Circuit has here approved a denial to petitioner of a prosecutor's memorandum showing knowing prosecutorial intention to use perjured testimony, followed the District Court's erroneous characterization, on that court's *in camera* inspection, of the nature of the memorandum, did not itself inspect the memorandum before rendering its opinion and held the District Court's ruling unreviewable. That procedure and those rulings were a direct denial of due process and contrary to the decisions of this Court and the other Circuits.

This Court stated in *United States* v. *Reynolds*, 345 U.S. 1, 12 (1953), "since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privilege to deprive the accused of anything which might be material to his defense."

In *Giglio* v. *United States*, 405 U.S. 150, 153 (1972), this Court held, "As long ago as *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known

false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in *Pyle* v. *Kansas*, 317 U.S. 213 (1942). In *Napue* v. *Illinois*, 360 U.S. 264 (1959) we said, '[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' Id. at 269. Thereafter *Brady* v. *Maryland*, 373 U.S. at 87, held that suppression of material evidence justifies a new trial irrespective of the good faith or bad faith of the prosecution." 405 U.S. at 153.

Again in *United States* v. *Agurs*, 427 U.S. 97, 104 (1976), this Court held that in cases involving a knowing prosecutorial use of perjury, a strict standard of materiality is required, "not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth seeking function of the trial process." 427 U.S. at 104. Where exculpatory evidence is discovered in the files of the prosecutor, even though, unlike here, the failure to disclose it at trial was merely negligent or an act of misjudgment, "the defendant should not have to satisfy the severe burden of demonstrating the newly discovered evidence probably would have resulted in an acquittal." 427 U.S. at 105.

Here the evidence not disclosed to petitioner showed not only that Friedland's testimony was perjurious, but that the prosecutor had planned it to be that and so deceptive (Friedland's denial of recollection of the state of the minutes) as to prevent effective cross examination. Possibly that was why the prosecutor failed at trial to disclose it or the facts on which the memorandum stated Friedland's involvement in the alternation of the minutes was based. That the prosecutor actually knew of the memorandum which he had prepared himself only a few days prior to Friedland's testimony cannot be doubted. When petitioner sought that memorandum under the Freedom of Informa-

tion Act, it was denied him on the basis that it was a privileged internal communication. In his affidavit in opposition to the petition below, the very same prosecutor denied that he knew what Friedland would say before he testified* (92). Yet the memorandum which that prosecutor had prepared prior to Friedland's testimony shows the prosecutor himself outlined the testimony which Friedland gave.**

Under "rudimentary standards of justice", petitioner was entitled to have the memorandum (and the underlying facts) for use at his trial. He was entitiled to them in support of his petition below. He did not get it. Reversal should follow, it is respectfully submitted. *Giglio, supra; Agurs, supra.*

In habeus corpus proceedings, the District Court has the obligation to fashion any necessary procedure to require the production of essential evidence. *Harris* v. *Nelson,* 394 U.S. 286, 299-300 (1969). The courts of other Circuits have followed this rule, e.g., *Shelton* v. *United States,* 497 F.2d 156, 159 (5th Cir. 1974); *Barry* v. *United States,* 528 F.2d 1094, 1101 (7th Cir. 1976); *Sullivan* v. *Dickson,* 283 F.2d 725, 727 (9th Cir. 1960); *Wagner* v. *United States,* 418 F.2d 618, 621 (9th Cir. 1969). See *Raines* v. *United States,* 423 F.2d 526, 529-30 (4th Cir. 1970). As this Court held in *Speiser* v. *Randall,* 357 U.S. 513, 520 (1958), "the procedures by which

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* This, of course, was no answer to the petition for under *Napue, supra,* the prosecutor is under a duty to correct false testimony once it is given. The prosecutor's duty to make exculpatory evidence available to the accused is well known. See ABA, Standards Relating to the Prosecution Function, Sec. 3.11(a).

** The memorandum also discloses that the prosecutor regarded Friedland's testimony as crucial to his case and reveals the animus against petitioner which motivated his urgent desire to provide that testimony. The prosecutor writes (inaccurately): "Milton Silverman is a notorious union racketeer who the Department has been investigating for some 10 years without success . . . this is the closest we have ever come!"

the facts of a case are developed assume an importance fully as great as the substantive rule of law to be applied." The decisions below were a clear departure from these rulings.

In *Alderman* v. *United States,* 394 U.S. 165, 182 (1969), this Court held that *in camera* examination of evidentiary material as was done below was insufficient, indeed would be a denial of due process if such examination alone were used by the District Court to rule on an application. As *Shelton* v. *United States, supra,* makes clear, in a Section 2255 proceeding even a confidential report must be made available for the use of the petitioner, not just the Court, where it is material to his application. In dealing with petitioner's protest against the *in camera* submission of the prosecutor's memorandum on the Friedland testimony and immunity, the District Court ruled, "Since the purpose in subpoenaing these memoranda was to have the Court consider them, petitioner has attained his goal." (160) Petitioner's goal was to have the memorandum disclosed so that the evidence therein and the natural further inquiry to which it would have led could be properly presented at the required hearing, not merely considered privately by the District Court without even being made a part of the record. Cf.: *Wingo* v. *Wedding,* 418 U.S. 461, 473-4 (1974). Certainly *Alderman* stands for the principle that whether *in camera* or open court examination is allowed, the material shall be available for review on appeal.

What happened at petitioner's trial was also a perversion of the immunity statute itself. Immunity when granted does not extend to perjury committed in the immunized testimony. 18 U.S.C. Sec. 6002. Here immunity was sought and granted for the purpose of procuring perjured testimony.

At a time when our government is pledged to clear its justice agencies of wrongdoing and concealment of such

wrongdoing, a decision such as the one below which completely frustrates a petitioner at trial, under Section 2255 or on appeal creates a morbid precedent.

2. The decision below failed to observe the due process standards requiring a grant of, or hearing on, a 28 U.S.C. Section 2255 application established by the decisions of this Court and those of other Circuits.

It was plainly improper for the decision below to affirm the District Judge's (who was also the trial judge) denial of the petition based on his interpretation of the trial evidence. The petition alleged facts *dehors* the record and in such instances at least a hearing is required. *Sanders* v. *United States,* 373 U.S. 1, 19-20 (1963); *Harris* v. *Nelson, loc. cit. supra.*

The petition and supporting affidavits and documents set forth detailed facts and allegations of knowing use of perjured testimony and other factors rendering petitioner's conviction constitutionally infirm which also required a hearing. *Sanders, loc. cit., supra.*

Rule 5(a) of the Rules Governing Section 2255 Proceedings requires that respondent's "answer shall respond to the allegations of the motion." See *Raines* v. *United States,* 423 F.2d 526, 529 (4th Cir. 1970). As has been seen, respondent's answer below woefully failed in this, the only affidavit in opposition, that of the prosecutor, did not deny perjury had been committed, did not deny that he knew of it, did not deny that he had suppressed evidence and witnesses and did not deny that he had willfuly failed to make investigation which would have revealed charges were baseless.* Under such circumstances, the petition might well

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* In connection with the alleged Chlystun payment of $1,000 to petitioner (15-21, 115, 150). See ABA Standards Relating to the Prosecution Function, Section 3.11(c).

have been granted for although given ample opportunity to do so, respondent made no further factual showing. See *Otero* v. *Rivera,* 494 F.2d 900, 902 (1st Cir. 1974); *United States* v. *Kessler,* 364 F.Supp. 66, 70-71 (S.D.O. 1973); *United States* v. *Johnson,* 288 F.2d 40, 45 (5th Cir. 1961). Cf. *Giglio* v. *United States,* 405 U.S. at 154.

At the very latest a hearing should have been ordered when respondent submitted *in camera* the prosecutor's memorandum which showed (as we have subsequently learned) that it contradicted the statement in his own affidavit that he had not known what Friedland's testimony would be.

The very wording of the statute required a hearing in this case. 28 U.S.C. Sec. 2255, Paragraph 3. *Machibroda* v. *United States,* 368 U.S. 487, 493-6 (1962).

The decisions of this Court, *Machibroda* v. *United States, supra; Fontaine* v. *United States,* 411 U.S. 213, 214-15 (1973); *Smith* v. *Yeager,* 393 U.S. 122, 125 (1968); *Townsend* v. *Sain,* 372 U.S. 293, 310, 312 (1963); and those of other circuits, *United States* v. *Haywood,* 464 F.2d 756, 762-3 (D.C. Cir. 1972); *Halliday* v. *United States,* 380 F.2d 270, 272 (1st Cir. 1967); *Moorhead* v. *United States,* 456 F.2d 992, 995-6 (3rd Cir. 1972); *Brown* v. *United States,* 462 F.2d 681, 684 (5th Cir. 1972); *Green* v. *United States,* 446 F.2d 650, 651 (6th Cir. 1971); *Crispo* v. *United States,* 443 F.2d 13, 14 (9th Cir. 1971); *Anderson* v. *United States,* 443 F.2d 1226, 1227-8 (10th Cir. 1971), are all contrary to the rulings below.

The constitutional and statutory necessity of a hearing in cases such as this one (unless the petition is granted on respondent's failure to make a sufficient response) is graphically illustrated by key rulings made against petitioner without any basis in the trial record: that petitioner

knew at the trial of the facts concerning Friedland's causing the alteration of the Executive Board minutes (124, 556 F.2d at 658) although Oschak, Sanchez and Brickman deny that (27-29), 46-7, 49-50), that all that the prosecutor knew of Friedland's role was a surmise or a suspicion (161; 556 F.2d at 658), although the prosecutor's memorandum itself contradicts this and was certainly sufficient to require further inquiry at a hearing.

The Court below emphasized the length of time between petitioner's original conviction and the appearance of the case below. 556 F.2d at 657. No recognition was given to an important causitive factor—respondent's failure to disclose to petitioner its memorandum on the Friedland testimony, at trial, under the Freedom of Information Act, on the filing of the petition, on appeal—not until after the petition for rehearing below had been denied.

Petitioner requested that the case be transferred and remanded for a hearing before a different judge (137-8; Appellee's main brief below, Point III), in view of the procedure followed below. In the light of this case it is respectfully suggested that this Court consider adopting the rule of *Halliday* v. *United States, supra,* that a Section 2255 hearing be held before a judge other than the trial judge. See Advisory Committee Note to Rule 4 of the Rules Governing Section 2255 Proceedings.

To allow the decision below to stand is to allow a nullification of the statutory and constitutional right of petitioner and the many others similarly situated to vindicate their well-founded and well-detailed allegations of denial of due process by the failure to hold a hearing in the District Court and the treatment of such failure in the Circuit Court as a mere exercise of discretion.

CONCLUSION

For these various reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LLOYD A. HALE
Counsel for Petitioner
109 Orchard Terrace
Piermont, New York 10968

October 11, 1977

IN THE

Supreme Court of the United States

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No. 77-546

MILTON SILVERMAN,

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v.

UNITED STATES OF AMERICA.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LLOYD A. HALE
Counsel for Petitioner
109 Orchard Terrace
Piermont, New York 10968

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Order of Denial of Motion to Reconsider Petition for Rehearing, August 30, 1977

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 30th day of August, one thousand nine hundred and seventy-seven.

MILTON SILVERMAN,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

It is hereby ordered that the motion made herein by counsel for the appellant dated August 11, 1977 to reconsider the petition for rehearing previously denied on July 14, 1977 and to grant the petition for rehearing be and it hereby is denied.

JAMES L. OAKES
CHARLES E. WYZANSKI, SR.
Circuit Judges

Motion for Reconsideration of Petition for Rehearing, August 11, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-2073—(76-2085)

MILTON SILVERMAN,
Petitioner-Appellant,

against

UNITED STATES OF AMERICA,
Respondent-Appellee.

Sir:

PLEASE TAKE NOTICE that a motion is hereby made in the United States Court of Appeals for the Second Circuit on the annxed affidavit of counsel for appellant and the annexed exhibit thereto for an order, pursuant to Rule 27 of the Federal Rules of Appellate Procedure, granting reconsideration of the petition for rehearing herein previously denied on July 14, 1977, and for such other and further relief as the Court deems just and proper.

Dated: New York, New York
August 11, 1977

Yours, etc.

LLOYD A. HALE, Esq.
Counsel for Appellant
109 Orchard Terrace
Piermont, New York 10968
(914) EL 9-5461

To:

ROBERT B. FISKE, JR., Esq.
United States Attorney
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007
Alan Levine, Esq., Asst.

Affidavit of Lloyd A. Hale, Annexed to the Foregoing Notice of Motion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-2073—(76-2085)

MILTON SILVERMAN,
Petitioner-Appellant,

against

UNITED STATES OF AMERICA,
Respondent-Appellee.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LLOYD A. HALE, being duly sworn, deposes and says:

1. I am the attorney for appellant and make this affidavit in support of a motion for reconsideration of his petition for rehearing previously denied by this Honorable Court (Hon. James L. Oakes, Circuit Judge; Hon. James S. Holden, Chief Judge of the District of Vermont; Hon. Charles E. Wyzanski, Senior District Judge). By separate order the issuance of the mandate was stayed.

2. Because of material which has just come into the possession of counsel for appellant, and hereinafter discussed, this extraordinary motion is made to allow the Court an opportunity to correct the decisions here and below which now appear to be based on important errors of fact

and law. Indeed, the withholding of that essential material, long sought by appellant, until after not only the rejection of his appeal by this Court but also after the denial of the petition is tantamount to a fraud on this Court as well as a denial of due process to Mr. Silverman.

3. Central issues on this appeal were the knowing prosecutorial use of perjured testimony of Jacob Friedland and the prosecutor's failure to turn over exculpatory material indicating that the very acts of alteration of union executive board minutes of which appellant was charged criminally and convicted had actually been caused and committed by Friedland who denied on the stand at appellant's trial, under prearranged questioning by the prosecutor that he had any knowledge or recollection of any changes in those minutes. (Appellant's main brief, pp. 9-13, 22-32, 37-41; reply brief 1-12, 20-21; slip sheet opinion 3940-1, 3942).

4. Long subsequent to the trial, appellant learned through application under the Freedom of Information Act that the prosecutor (Mr. Maloney) had at his trial written a memorandum to the Department of Justice in support of his application to immunize Friedland from prosecution concerning the testimony sought from him. (Appellant's main brief, p. 11). Appellant sought that Maloney memorandum through appeal under the Freedom of Information Act, by subpoena and by motion below, unsuccessfully. (Id. at 12). There is no doubt that appellee's counsel was chargeable with knowledge of the contents of the Maloney memorandum (as was of course, Mr. Maloney, then and at the trial) since he turned it over to the court below *in camera*, under "a bond of secrecy" and the court accepted

it in that manner and without disclosing its contents to appellant used it in ruling on the merits against him. (Id. at 12-13). Thus on at least five occasions after his trial, the Maloney memorandum was used to deny appellant due process in addition to its suppression at trial.

5. A sixth such denial occurred in this Court, when appellee, knowing of the contents of the Maloney memorandum, knowing that it was not before this Court for review because of the way it was handled in the Court below (petition for rehearing, p. 7), knowing of its erroneous use and misconstruction in the court below, and knowing of the direct and implied misrepresentations in appellee's brief in this Court as to the Maloney-Friedland transactions, deliberately withheld production under the Freedom of Information Act until after this Court had denied the petition for rehearing.

6. A copy of the Maloney memorandum reached counsel for appellant the first week in August, 1977 (a copy is annexed to the affidavit as an exhibit). The covering letter (also annexed hereto) is dated July 14, 1977, the date this Court's orders were filed denying the petition for rehearing and hearing en banc.

7. An examination of the Maloney memorandum shows it is a direct refutation of every ruling made in the court below on the knowing use of Friedland's perjury and the suppression of exculpatory evidence as to the actual facts of the alteration of the executive board minutes. Item 8 of the Maloney memorandum states the basis for granting immunity to Friedland—"obstruction of justice on the part

of Mr. Friedland in the tampering with books in question" —no surmise that. (see 161).* It is a prosecutorial statement of fact to his superiors with the intention that they should act on it. Not a word to the defense of this in eight years. Worse, Item 7 of the Maloney memorandum shows a design for perjury and deception of the defense for it summarizes accurately and in advance the testimony that Friedland actually gave at the trial—not that he tampered with the books, but that on being shown his report to the union he would merely testify that "pages of the union books are not now in the same condition as they were before the grand jury." This is directly contradictory of the Maloney affidavit in opposition representation that the prosecutor did not know what that testimony would be before it was given (91), adopted as a finding by the District Court (122), and affirmed by this Court (slip sheet op., p. 3940). The Maloney memorandum shows beyond cavil that the prosecutor of appellant not only knew beforehand what Friedland's testimony would be but had designed, in the knowledge that it would be and was directly perjurious and deceptive in its implications that Friedland was not the tamperer of the records.

8. The urgency of the use of that testimony and the motivation is also shown in the Maloney memorandum. Item 9 characterizes appellant as "a notorious union racketeer" under investigation "for some 10 years without success • • • this is the closest we have ever come!" Maloney wrote *"Both the trial judge and myself believe* that one of the crucial issues in the case is whether or not

* References in this form are to the Joint Appendix on this appeal.

the minute books were tampered with." (emphasis added). Of course, by procuring the immunity and presentation of the predesigned testimony, the question of who did the tampering was presented without the jury having the evidence before it that Friedland caused the tampering and therefore it drew the inference desired by the prosecution, with the defense helpless to refute, that the tampering was at the behest of appellant (which taints the conviction as to all counts, since the trial court charged that such conduct as record tampering could be used as consciousness of guilt as to all counts).

9. In justifying its refusal to turn over the Maloney memorandum to appellant, the court below stated "their disclosure would probably cause the Government some harm." (161). The annexed Maloney memorandum demonstrates that the only "harm" that could result from their disclosure is the overturning of a conviction secured through a denial of due process, a verdict tainted by the knowing use of perjury. But that result is not a "harm" to our government, it is required by the Constitution as *Berger* v. *United States,* 295 U.S. 78, 88 (1934) held. The same salutory result for which appellant has so long fought, and so wrongfully been denied should follow here.

10. It is respectfully prayed that the stay of the mandate herein previously granted be continued to allow consideration for this motion, and, if relief is denied, pending the filing of a petition for a writ of certiorari in the Supreme Court of the United States.

Affidavit of Lloyd A. Hale, Annexed to the Foregoing Notice of Motion

WHEREFORE, for the reasons stated herein, this motion should be granted and on reconsideration, the relief requested in the petition for rehearing be granted, and that the stay of the mandate be continued.

LLOYD A. HALE
Counsel for Appellant

Sworn to before me this 11th day of August 1977.

Leah Scherer

LEAH SCHERER
Notary Public
Notary Public, State of New York
No. 41-4619390
Qualified in Queens County
Commission Expires March 30, 1979

APPENDIX, ANNEXED TO THE FOREGOING AFFIDAVIT

Letter to Lloyd A. Hale, From United States Department of Justice

UNITED STATES DEPARTMENT OF JUSTICE

Washington, D. C. 20530

July 14, 1977

Mr. Lloyd A. Hale
36 West 44th Street
New York, New York 10036

Dear Mr. Hale:

The Deputy Attorney General advised you by his letter dated June 16, 1977 that the Criminal Division would make a supplemental release of certain records to which your client, Mr. Milton Silverman, was orginally denied access.

Accordingly, copies of the documents listed on the attached Schedule are enclosed herewith. There will be no charge for the reproduction of these documents.

Very truly yours,

BENJAMIN R. CIVILETTI
Assistant Attorney General
Criminal Division

By: E. Ross BUCKLEY
E. Ross Buckley
Attorney in Charge
Freedom of Information/Privacy Unit

Schedule of Documents

1. Memorandum dated 3/11/69; (1 page). A segment has been excised.

2. Memorandum dated 3/12/69; (2 pages).

Memorandum, Dated March 11, 1969

"3/11/69

From Andy Maloney SDNY 212-264-6427

1. Jacob Friedland, Esq. (an attorney) in *U.S.* v. *Milton Silverman* 591 Summit Ave. Jersey City, New Jersey

2. unknown

3. none (FBI case no. 159-2561)

4. none known

5. no

6. Trial of *U. S.* v. *Milton Silverman,* President Local 810 Teamsters, business manager IBEW, administrator of relative union funds embezzlement 29 U.S.C. 501(c) converting union funds

7. Document in possession of judge which is a document prepared by Friedland at or about time certain exhibits in evidence in trial were subpoenaed—Mr. Friedland could testify that the crucial pages of the union books are not now in same condition as they were before they were produced before the grand jury and therefore would be crucial to proving that the appearance in the union books as presently indicated is not in fact x exhibits. (converted funds of union to own use)

8. Obstruction of justice on the part of Mr. Friedland in the tampering with books in question

Memorandum, Dated March 11, 1969

9. Both the trial judge and myself believe that one of the crucial questions in the case is whether or not the minute books were tampered with. Mr. Friedland could testify that they are not now in the same condition as before the production to the Grand Jury. The judge is in possession of an attorney-client privilege document which should preclude Friedland from giving a false answer.

Milton Silverman is a notorious union racketeer who the Department has been investigating for some 10 years without success . . . this is the closest we have ever come!

10. Will testify

Needed by Thursday Morning . . . *March 13, 1969.*"

Memorandum, Dated March 12, 1969

3/12/69
HEP:JWV mmj

Will Wilson
Assistant Attorney General
Criminal Division

Henry E. Petersen, Chief
Organized Crime and
Racketeering Section

Request for Authorization to Immunize
Jacob Friedland, Esq.

Assistant United States Attorney Andy Maloney, Southern District of New York, has requested authorization to seek a grant of immunity for Jacob Friendland, Esq., in connection with the trial of Milton Silverman, President of Local 810 of Teamsters, for embezzlement. 18 U.S.C. Sections 2514, 2516 (1) (b) is applicable because a violation of 29 U.S.C. Section 501(c) is involved.

Jacob Friedland is an attorney in New Jersey who represented Silverman prior to the Grand Jury's investigation of Silverman. Friedland has no police record and no federal or local charges are pending against him. He is not presently incarcerated.

Milton Silverman is a notorious union racketeer whom the Department has been investigating for ten years.

The judge believes that one of the crucial questions in the trial, which is in progress at the present time, is whether the union minute books have been altered. If immunized, Friedland could testify that the crucial pages of the union books are not now in the same condition as they were be-

Memorandum, Dated March 12, 1969

fore and at the time they were presented to the Grand Jury. Before the books were produced at the Grand Jury, Friedland prepared a document, now in the judge's possession, which described them as of that time. This document could be used to refresh his recollection and to prevent him from giving a false answer. His testimony is crucial to proving that the books have been altered.

There is no attorney-client problem as Friedland would not be testifying about any communication from Silverman.

Friedland was asked about the books during the trial. He claimed his Fifth Amendment privilege against self-incrimination, and refused to answer. Immunization might excuse him from prosecution for obstruction of justice by tampering with the books in questions. However, it is felt that his testimony is essential to the conviction of Silverman, which conviction is more important than possible prosecution of Friedland.

This immunity is needed by Thursday morning, March 13, 1969, as the trial is presently in progress.

We recommend that immunization of Jacob Friedland be authorized.

Order of Denial of Petition for Rehearing, July 14, 1977

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

76-2073—76-2085

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of July, one thousand nine hundred and seventy-seven.

Present:

HONORABLE JAMES L. OAKES
Circuit Judge

HONORABLE JAMES S. HOLDEN
HONORABLE CHARLES E. WYZANSKI
District Judges

—o—

MILTON SILVERMAN,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

—o—

A petition for a rehearing having been filed herein by counsel for the Appellant.

Upon consideration thereof it is

ORDERED that said petition be and it hereby is denied.

A. DANIEL FUSARO, Clerk

By: LIESA BING
Deputy Clerk

Order of Denial of Petition for Hearing, *En Banc*, July 14, 1977

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 76-2073

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of July, one thousand nine hundred and seventy-seven.

—o—

MILTON SILVERMAN,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

—o—

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

IRVING R. KAUFMAN,
Chief Judge

Judgment of Court of Appeals, May 31, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

76-2073, 76-2085

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of May, one thousand nine hundred and seventy-seven.

Present:

HON. JAMES L. OAKES
Circuit Judge
HON. JAMES S. HOLDEN
HON. CHARLES EDWARD WYZANSKI
District Judges

—o—

MILTON SILVERMAN,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

—o—

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

by ARTHUR HELLER
Arthur Heller
Deputy Clerk

Opinion of Court of Appeals Affirming Order of Court Below of May 7, 1976, Decided May 31, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1004, 1005—September Term, 1976.

(Argued April 7, 1977 Decided May 31, 1977.)

Docket Nos. 76-2073, 76-2085

MILTON SILVERMAN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

OAKES, *Circuit Judge,* HOLDEN, *District Judge,** and WYZANSKI, *Senior District Judge.***

Appeal from an order of the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge,* denying a petition, pursuant to 28 U.S.C. § 2255, to vacate petitioner's sentence, sought principally on the grounds that his conviction, affirmed in *U.S.* v. *Silverman,* 430 F.2d 106 (2nd Cir., 1970), was the product

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* Chief Judge for the District of Vermont, sitting by designation.

** Senior District Judge for the District of Massachusetts, sitting by designation.

of the prosecution's knowing use of perjured testimony and failure to disclose evidence, and from a further order of the same court and same judge denying the petitioner's motion under F.R.C.P. Rule 60 (b) to vacate the order earlier mentioned for alleged errors in the opinion accompanying that earlier order.

LLOYD A. HALE, New York, New York, *for Appellant.*

ROBERT B. FISKE, JR., United States Attorney for the Southern District of New York, ALAN LEVINE, ROBERT J. JOSSEN, AUDREY STRAUSS, Assistant United States Attorneys, of Counsel, *for Appellee.*

WYZANSKI, *Senior District Judge:*

This is an appeal by Silverman (whose conviction and sentence on charges of violating 18 U.S.C. § 664 and 29 U.S.C. § 439 (b) and (c) and U.S.C. § 501 (c) were affirmed by us in *United States* v. *Silverman,* 430 F. 2d 106 (2nd Cir., 1970)), from two orders of Judge Palmieri in the District Court for the Southern District of New York. In his first order, dated May 7, 1976, Judge Palmieri denied Silverman's petition, under 28 U.S.C. § 2255, to vacate the conviction which he alleged had been procured by the Government's knowing use of perjured testimony, and which he alleged had been impeached by newly-discovered evidence. The judge's second order, dated July 16, 1976, denied what is described by Judge Palmieri in an accom-

panying opinion of the same date, as a motion by Silverman, apparently pursuant to Rule 60 Fed. R. Civ. P., to vacate the opinion and order of May 7, 1976.

At the outset we dismiss the appeal from the order of July 16, 1976 as improperly taken. Of course, denial of a motion to vacate an *opinion* is non-appealable. And denial of a motion to vacate an earlier order is likewise unappealable at least so long as the earlier order itself is appealable and has been timely appealed.

With respect to the appeal from the May 7, 1976 order, we begin with a review of the history of Silverman's conviction and sentence, which he now seeks to have vacated pursuant to 28 U.S.C. § 2255, and which we affirmed seven years ago in *United States* v. *Silverman, supra.*

In the case before us seven years ago, it appeared that the grand jury had indicted Silverman on counts which charged him, *inter alia,* with the offenses of (as recited in count 14) embezzling $1,000 proceeds from the sale to a junk dealer of an air-conditioning unit belonging to United Wire, Metal and Machine Welfare Fund, of which Silverman was a Trustee and the Administrator, in violation of 18 U.S.C. § 664, of (as recited in count 15) causing a false statement concerning union expenditures to be made in a form submitted to the Secretary of Labor by Local 810, International Brotherhood of Teamsters, of which Silverman was President, in violation of 29 U.S.C. § 439 (b), of (as recited in count 18) causing false entries concerning the authorization of Christmas gratuities and personal loan expenditures to be made in the Local 810 executive board minutes, in violation of 29 U.S.C. § 439 (c), and of (as recited in counts 9, 10, and 12) embezzling Local 810 funds which Silverman explained as expenses for an International Brotherhood of Teamsters convention, as Christmas gratuities, and as personal loans, in violation of 29 U.S.C. § 501 (c).

In a trial before Judge Palmieri, about eight years ago, a petit jury convicted Silverman on the aforesaid charges, and Judge Palmieri sentenced him to four months to be served concurrently on, *inter alia,* counts 9, 10, 12, 14, and 15, and to four months to be served consecutively on count 18. He was also fined $1,000 on each of the counts on which he was found guilty. Silverman has served those sentences and paid those fines.

In the criminal trial there had been extensive conflicting evidence as to whether the Welfare Fund, in accordance with customary procedures, had abandoned an air-conditioning unit which it had owned, or had retained the unit as property of the Welfare Fund. There had been testimony from Chlystun that when the air-conditioning unit had been sold to a scrap dealer, Chlystun received the $1,000 proceeds and paid over that amount to Silverman.

During the trial there had been an issue as to *when* there had been placed upon the Local 810 executive board minutes entries showing alleged authorizations of payments to Silverman for Christmas gratuity and personal loan expenditures. The Government called as a witness Jacob Friedland, an attorney. Friedland declined to confer with counsel for the prosecution, and gave the Government no advance knowledge of what he would say. Claiming his privilege under the Fifth Amendment, he at first refused to testify. Only when immunity was conferred upon him did he take the stand. The Government informed the court and the defendant that it would examine Friedland only upon what was indicated in a report that, at Silver-

man's direction, Friedland had made to Silverman and Local 810 when they had retained Friedland to examine the entries which appeared in the executive board minutes of the local. The essence of Friedland's testimony is contained in the following passage:

> "Q. You didn't find these two pages in the minute books in this condition they're in today, is that your testimony? A. I have no recollection of the condition of the minute books or how they were written. I do know that making reference to my report I found as inconsistent situation which made me believe that there was a change in the minutes."

Friedland was not asked if he knew who altered the books.

It was against this background that in the instant case Silverman filed in the District Court his petition, pursuant to 28 U.S.C. § 2255, to vacate the judgment of conviction which had been entered and affirmed seven years ago. The thrust of the petition was directed to allegations that the Government had knowingly used perjured testimony and had failed to disclose evidence helpful to Silverman. The petitioner claimed that he had newly-discovered evidence.

In accordance with the practice in the District Court, the clerk of that court assigned the petition to Judge Palmieri. Precipitately, Silverman's counsel served on the Government a subpoena *duces tecum* at a time when no court hearing had been scheduled. Later Silverman did not seek compliance with the subpoena at an appropriate time.

Judge Palmieri, without a hearing, wrote a 17 page opinion denying the petition on the grounds that the proffered

evidence as to the air-conditioner was cumulative and related to an issue fully canvassed at the trial, that there was no showing that either Chlystun or Friedland had committed perjury, or that the Government had known of any perjury, and that if Friedland had lied about his relation to the falsification of the minute book Silverman at the trial had full information about that perjury but Silverman's then attorney, as a matter of trial tactics, had deliberately avoided the exposure lest it produce a conviction. On the basis of that opinion, Judge Palmieri on May 7, 1976 entered that order denying the petition which is now here on appeal.

Then in the District Court, Silverman moved to vacate both the opinion and the May 7, 1976 order. He claimed that the opinion was erroneous, that Judge Palmieri should have held a hearing, and that the case should be assigned to another judge. On July 16, 1976 Judge Palmieri filed an opinion and entered an order denying the motion. That order, as we have already said, is not an appealable order and is not before us.

We affirm the District Court's May 7, 1976 order.

The issue as to the ownership of the air-conditioner was fully litigated at the criminal trial. In the 28 U.S.C. § 2255 proceedings in the District Court the petitioner made no *prima facie* showing that on that issue he had any newly-discovered evidence, or that Chlystun had committed perjury, or, if he had, that the Government knew it. Without considering that matter further, we merely repeat the familiar principle that "it is the *knowing use* by the Government of false evidence that constitutes the denial of due process". *Hoffa* v. *United States*, 339 F. Supp. 388, 392 (E. D. Tenn., 1972), aff'd 471 F.2d 391 (6th Cir., 1973), cert. den., 414 U.S. 880 (1973).

With respect to Silverman's claim that the Government knowingly used the perjurious testimony of Friedland and suppressed information it had about him, we can only stand aghast at the effrontery of Silverman's contention. There is not a shred of evidence that the Government had from Friedland or from any other source admissible evidence or even a lead that showed that *he* had made the false entries in the minute book. No doubt, the prosecutor had his suspicions. But a person who did know the full role of Friedland was Silverman himself. It is fairly inferrable that he at the least acquiesced in an alteration made by Friedland.

Moreover, Silverman's counsel at the criminal trial deliberately, as a matter of trial tactics, did not seek to show, and, for obvious reasons, would not have wanted to show, that Friedland himself altered the minutes. Any such revelation of falsification by the attorney would have been attributed by the jury, in all probability, to the client who retained him. In any event, the tactical decision made at the criminal trial precludes Silverman from relying on his CHUTZPADICH contention that he has new evidence of his attorney's falsifications. *Meyers* v. *United States*, 446 F.2d 37 (2nd Cir., 1971).

The petitioner's suggestions that the prosecution intimidated prospective witnesses for the defense and that the prosecution failed to prove an offense have no merit.

Petitioner's contention that the District Court erred in not enforcing a subpoena must fail because admittedly Silverman first did not serve the subpoena at the proper time, and then when he did serve it tardily he did not press it.

Silverman is mistaken in his argument that the District Court had a duty in this case to hold an oral hearing. Nothing raised by the written petition required exploration *viva voce*, *United States* v. *Franzese*, 525 F.2d 27 (2nd Cir., 1975). Cf. *Sanders* v. *United States*, 373 U.S. 1, 20 (1962).

We cannot close this opinion without commenting upon the unnecessary waste of judicial time in the District Court and in this Court in being faced with what is a manifestly frivolous petition and a manifestly frivolous appeal.

We recognize the cardinal importance that no person should be convicted upon the basis of perjury. We wholeheartedly support the rule that it is a denial of the due process guaranteed by the Fifth Amendment for a person to be convicted on the basis of testimony known to the Government to be perjurious. But this was not by any stretch of the imagination an instance where the rule could be appropriately invoked.

The order of May 7, 1976 is affirmed.

The appeal from the order of July 16, 1976 is dismissed.

Opinion of District Court Denying Reconsideration of Motion Pursuant to 28 U.S.C. 2255, July 16, 1976

CR 181 OPIN 566

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 4959 (68 Cir. 762) E.L.P.

MILTON SILVERMAN,

Petitioner,

against

UNITED STATES OF AMERICA,

Defendant.

APPEARANCES

LLOYD A. HALE, ESQ.
36 West 44th Street
New York, N. Y. 10036
Attorney for Petitioner

ROBERT B. FISKE, JR., ESQ.
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, N. Y. 10007
ALAN LEVINE, ESQ.
Assistant United States Attorney
Of Counsel

Opinion of District Court Denying Reconsideration of Motion Pursuant to 28 U.S.C. 2255, July 16, 1976

PALMIERI, *J.*

Petitioner moves, *inter alia,* to vacate the opinion and order of this Court dated May 7, 1976, denying his petition for relief pursuant to 28 U.S.C. § 2255. The discussion which follows assumes a familiarity with that opinion.

The motion to vacate is apparently brought pursuant to Rule 60, Fed. R. Civ. P., on the alleged premises of surprise and mistake of law and fact. As detailed below, there is no merit to the claim of surprise; the claims of mistake of law merely display disagreement with the adverse decision of the Court; and the confusion as to the identity of one affiant has no effect on the conclusions arrived at. Therefore, the motion to vacate the opinion and order must be denied.

In addition to the motion to vacate, petitioner has moved pursuant to Rules 26 and 45, Fed. R. Civ. P., (1) to compel the United States Attorney to comply with a subpoena duces tecum, (2) to preserve the testimony of one Herman Brickman, (3) to refer the matter to another judge and (4) for a hearing. These matters are discussed seriatim.

This Court declines to enforce the subpoena. The petitioner served the subpoena, of questionable validity, very late in these proceedings and did not press it even then. In addition, the Court considers the material sought thereby to be irrelevant and immaterial to the matter at hand.

The petition was filed on October 8, 1975. After a number of delays, each consented to by the petitioner, the Government filed its answer to the petition on January 30, 1976. For all ostensible purposes, the submission of papers was complete at that point and the Court so considered it. However, without requesting leave of court, the petitioner

apparently decided, and the Government informally agreed,[1] that he would be allowed to file a reply. After several additional extensions of time, petitioner's counsel filed, on March 9, 1976, a reply affidavit in which he mentioned having served a subpoena on the United States Attorney. Other than this, the Court received no formal notice of the status of the subpoena until the filing of this motion one month after the opinion of May 7, 1976 was filed.

The subpoena was served very late in the proceedings when the petition was *sub judice*. It was made returnable on a date when no activity was scheduled in this matter, nor was a court order sought to authorize the subpoena or to set a date, time or place for the return. It was served on March 8, 1976, and was made returnable the very next day. Petitioner's counsel claims an Assistant United States Attorney told him, shortly after service of the subpoena, that the Government had obtained an "adjournment" of the subpoena from the Court. The Government denies this. No such request was made to the Court and no "adjournment" was granted. In the following two months, petitioner made no motion to enforce the subpoena nor did the Government move to quash it.

The fact that there was no scheduled court proceeding to which the subpoena could be made returnable leads the Court to question its validity. *See Sullivan* v. *Dickson,* 283 F.2d 725 (9th Cir. 1960) (*If* a hearing were granted, a subpoena duces tecum would issue as a matter of right.); *Taylor* v. *Litton Medical Products, Inc.,* 19 F.R.Serv.2d 1190 (D. Mass. 1975). The subpoena was served pursuant to Rule 45 which falls within the section of the Federal Rules of Civil Procedure captioned "Trials." Furthermore, the Notes of Advisory Committee on Rules and Historical Notes begin with the following sentence: "This rule applies to subpoenas ad testificandum and duces tecum issued by the district courts *for attendance at a hearing or a trial,* or to take depositions (emphasis added). 28 U.S.C.A., Fed. R. Civ. P. 45 at 297. The subpoena here clearly was not issued for the taking of a deposition pursuant to Rule 45(d), despite the words on the printed form, and no hearing or trial was scheduled nor were there any other proceedings to which the subpoena could attach.

Even if the subpoena were valid and if the Assistant United States Attorney could be faulted for not making a motion to quash, the Court would not enforce the subpoena under the circumstances described. The fact that the subpoena was served so tardily, and was not thereafter pressed, disposes the Court to refuse to enforce it.

Furthermore, the subpoena presently has no further purpose since the Government has substantially if not fully complied with the requests it contains. The petitioner drew the subpoena in the following language:

> "YOU ARE HEREBY COMMANDED to appear . . . and bring with you
>
> 1. Memorandum of Andrew Maloney, Esq., dated on or about March 11, 1969, re granting of immunity to Jacob Friedland in 68 Cr. 762;
>
> 2. All other books, papers, records, documents, memoranda concerning immunity to Jacob Friedland and other witnesses in 68 Cr. 762;
>
> 3. Remainder of your files in 68 Cr. 762 concerning exhibits, Sec. 3500 material, *Brady* material and such

other material as the Court may deem just and proper, then and there to testify on behalf of the Petitioner . . . ."

With respect to paragraph 3, the Government claims to have made available all material includable within the request. The request lacks sufficient specificity to gainsay that claim and petitioner has not cured this insufficiency in any of his papers. With respect to paragraph 1, the petitioner seeks to obtain the memorandum of the prosecutor at the trial of petitioner, former Assistant United States Attorney Andrew Maloney, dated March 11, 1969, and addressed to the Department of Justice, in which he requested a grant of immunity to Jacob Friedland.[2] Without relinquishing any of its claims and in hopes of expediting this matter, the Government has *sua sponte* submitted to the Court for in camera inspection, with a request for confidentiality, the Maloney memorandum together with a covering memorandum.[3]

Contrary to the assertion of counsel for petitioner that this is "an extraordinary and prejudicial procedure," the Court sees nothing untoward about the submission of these memoranda for in camera inspection. This is substantially the same procedure the Court would have followed at a hearing on a motion to enforce or quash the subpoena: submission to the Court for resolution of the conflicting claims. The Court has not felt constrained to limit its review of these memoranda to the question of discoverability. Rather it has taken the liberty of considering their effect on petitioner's claims. Since the purpose in subpoenaing these memoranda was to have the Court thus consider them,

petitioner has attained his goal. The Court prefers, however, to respect the Government's request for confidentiality. This request is based on reasons that are apparent on the face of the memoranda, are well founded, and are unrelated to petitioner's claims. These memoranda were clearly drawn with an understanding that they would remain confidential, and their disclosure would probably cause the Government some harm.

The Court has reviewed these memoranda and sees no reason to depart from its prior decision. The petitioner seeks to establish that the Government knowingly used perjured testimony by Jacob Friedland. In the previous opinion, this Court made three findings contrary to petitioner's habeas corpus claim for relief based on this charge: (1) that the Government could not have been certain beforehand what Friedland's testimony would be; (2) that the transcript does not show Friedland to have made the statements that petitioner claims were false; and (3) that any role Friedland may have had in altering the union books would not change the verdict because Silverman was convicted not of altering the books himself but of causing them to be altered, and he alone stood to gain by the alteration. Neither the Maloney memorandum nor its covering memorandum casts doubt on any of these findings. The Maloney memorandum indicates that the prosecutor surmised that Friedland's claim of his fifth amendment privilege was based on some involvement in the alteration of the union's books. This would not support a finding that the prosecution knew what that involvement was. More importantly, as found in the prior opinion, petitioner's assertion that Friedland perjured himself is untenable. A careful scrutiny of Friedland's

testimony reveals no basis for finding perjury even if Friedland himself ordered the alteration of the books. This is not changed by the two memoranda.

Petitioner also claims that the Government failed to disclose exculpatory material in violation of its duties under *Brady* v. *Maryland*, 373 U.S. 83 (1962). Unlike the petitioner in *Brady*, the petitioner here apparently made no request for the allegedly suppressed evidence. This is also not a case of petitioner being unable to request the evidence because he did not know of its existence. The record shows that the Government stated in open court that it had some indication of involvement by Friedland in the alteration of the books and that it had communicated with the Department of Justice concerning immunity for Friedland. On this Due Process theory, petitioner is entitled to relief when, "evaluated in the context of the entire record," "the omitted evidence creates a reasonable doubt that did not otherwise exist. . . ." *United States* v. *Agurs*, —— U.S. ——, ——, 44 U.S.L.W. 5013, 5015 (June 24, 1976). There is evidence in the record that clearly shows that Silverman directed, dominated and controlled the activities of Local 810 and this was abundantly clear before and during trial from the tenor and maneuverings of his defense. He alone had a strong interest in the alteration of the books. He retained Friedland to respond to the grand jury subpoena. In these circumstances, even assuming that the Government failed to disclose some evidence, whether it be the Maloney memorandum or the information contained in the affidavits of Oschak and Sanchez and Herman Brickman, or both, it cannot be said that this evidence "creates a reasonable doubt that did not otherwise exist. . . ."

At trial, petitioner sought to prove that the books had not been altered. The prosecutor had said in open court that he had some indication that Friedland was involved in the alteration of the books, and he also had indicated the limited questions he would put to Friedland. The petitioner knew this, yet he stuck to his theory and argued in summation that Friedland was mistaken. Possibly the petitioner thought that if Friedland were shown to have altered the books, the jury would conclude that he had done so at the petitioner's direction. Whatever the reason, the choice was a binding tactical decision and petitioner is not entitled to a separate trial on each theory available to him.

Regarding the affidavit and proffered testimony of Mr. Herman Brickman, apparently there was some confusion as to his identity. It appears that this Brickman is not the same Brickman who testified at trial and the Court mistook one for the other. However, the fact that he did not testify at trial and may not have been available to petitioner at that time does not change the conclusions stated in the opinion regarding his proffered testimony. As explained there, its sole effect would be to impeach Friedland, a witness with close ties to Silverman and clearly hostile to the Government. The Court can ascribe to it neither solidity nor persuasiveness. Thus it is not necessary to preserve that testimony by way of deposition or hearing.

Silverman has raised again in this motion his contention that affiants Oschak and Sanchez were not under his dominion and control and were not available to testify on his behalf at the trial because the Government effectively suppressed their testimony by the heavy-handed use of subpoenas and threats of prosecution. The Court rejected this contention in its opinion. But, even if this contention

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and the affidavits of Oschak, Sanchez and Herman Brickman were accepted as true, the effect, as stated in the opinion, would not be such that a jury would likely, much less probably, reach a different verdict.

Petitioner's motion for recusal is a half-hearted attempt that cannot be taken seriously. He made no effort to comply with the applicable statutory procedures. 28 U.S.C. § 144 (affidavit of bias and prejudice by a party; certificate of counsel of record stating that the affidavit is made in good faith). Moreover, his counsel's affidavit blatantly misrepresents that the Court's opinion characterized the petition as a "gross imposition on the Court." This characterization clearly referred only to Silverman's contention regarding the authorship of Exhibit 47—a matter thoroughly reviewed before the jury which rejected Silverman's views of it. Apparently petitioner is attempting, by the use of spurious and questionable allegations, to launch false issues that will distract attention from the insubstantiality of his claims.

The Court finds that petitioner has raised no substantial evidentiary questions and declines to hold a hearing for any of the purposes suggested in the motion. The Court adheres in all respects to the conclusions set forth in its opinion of May 7, 1976.

The motion is denied. It is so ordered.

EDMUND L. PALMIERI
Edmund L. Palmieri
U.S.D.J.

Dated: New York, N. Y.
July 16, 1976

Opinion of District Court Denying Application Pursuant to 28 U.S.C. 2255, May 5, 1976

CR 181 OPIN. 565

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 4989 (68 Cr. 762) E.L.P.

MILTON SILVERMAN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

APPEARANCES

LLOYD A. HALE, ESQ.
36 West 44th Street
New York, N. Y. 10036
Attorney for Petitioner

ROBERT B. FISKE, JR., ESQ.
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, N. Y. 10007

ALAN LEVINE, ESQ.
Assistant United States Attorney
Of Counsel

PALMIERI, *J.*

This is a motion pursuant to 28 U.S.C. § 2255 to vacate a judgment of conviction. The petitioner, Milton Silverman, was convicted after a nine day jury trial of sixteen counts of an 18-count indictment charging him with embezzlement of union funds and falsification of union books and records. 18 U.S.C. § 664; Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 431(c), 436, 439(b)(c) and 501(c). That conviction was affirmed with respect to eight counts (namely, counts 9 through 15 and count 18) and reversed with respect to the first eight counts. *United States* v. *Silverman*, 430 F.2d 106 (2d Cir. 1970). The result of this disposition was to reduce the total fines from $16,000 to $8,000, but to leave the eight month prison sentence unimpaired. The basis for the partial reversal was the view of a majority of the court that their construction of 29 U.S.C. § 501(c) required a reversal of counts 1 through 8 because of insufficient evidence that the payment of certain printing bills for a New York mayoralty campaign constituted a larceny of union funds. Certiorari was denied by the Supreme Court on May 3, 1971, *Silverman* v. *United States*, 402 U.S. 953 (1971); *rehearing denied*, 403 U.S. 924 (1971). The petitioner served his sentence and was released from the Federal Correctional Institution at Danbury, Connecticut, on December 21, 1971.

The petitioner's first attack upon his conviction was by way of a motion for a new trial, which was consolidated with his appeal. Thereafter, he moved pursuant to Title 28, U.S.C. § 2255, in 1971, to vacate the judgment on the ground that the proof at trial had the effect of amending one count of the indictment (count 18) in contravention of his Fifth Amendment rights. This motion was denied, with an opinion of this Court dated March 21, 1972, and was affirmed by the Court of Appeals in open court following oral argument. *United States* v. *Silverman*, 469 F.2d 1404 (2d Cir. 1972), *cert. denied*, *Silverman* v. *United States*, 93 S.Ct. 2271 (1973).

This most recent motion to vacate his judgment of conviction is couched in terms of prosecutorial misconduct—that the prosecution knowingly used perjured testimony and that it failed to produce material exculpatory of the petitioner. This is not the first time Silverman has attacked the prosecutor. He mounted an unsuccessful attack of the same nature when he appealed from his conviction. *See United States* v. *Silverman*, 430 F.2d 106, 124-125 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971). As in the past, the petitioner is taking another hindsight view of his tactical decisions at the trial and of the evidence presented against him and is seeking to draw impermissible inferences from them in order to demonstrate that the prosecutor should be faulted.

Specifically, Silverman relies on three alleged claims of error: (1) that the testimony of one Jacob Friedland, an attorney, who testified that he was counsel to Silverman as well as to Silverman's union, was perjurious and that the Government solicited that testimony knowing it was perjurious; (2) that the testimony of one Paul Chlystun was perjurious and that the Government could have ascertained this had its investigation been pursued according to certain lines of inquiry; and (3) that the Government's allegation that petitioner dominated and controlled Local 810, as evidenced by Government's Exhibit 47, was false. As he did at the trial and upon his appeal from his conviction, petitioner seeks to raise issues with respect to the ownership of a certain air-conditioning unit involved with count 14.

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THE CLAIM AS TO THE TESTIMONY OF JACOB FRIEDLAND

Silverman claims that the prosecutor knowingly used false testimony at his trial, and suppressed evidence helpful to his defense. The testimony referred to is that of Jacob Friedland, an attorney retained to examine certain books and records because of a federal grand jury subpoena in February 1967. Friedland testified that, in a report to Local 810 on March 3, 1967, he had stated that authorizations for certain expenditures did not appear in the minute books. He further testified that he did not recall what the condition of the Executive Board minutes was at the time he originally looked at them prior to making his report. However, he said that by looking at his report, which pointed out that there had been no approval for a loan and a $2,000 payment to Silverman, he concluded that the minutes as presented to the grand jury must have been altered, because when handed over to the grand jury they reflected authorizations for the loan and the $2,000 payment. He also testified that a copy of the report was sent to Silverman.

The essence of Friedland's testimony is contained in the following passage concerning the pages of the minute books the Government contends were fabricated:

> Q. You didn't find these two pages in the minute books in this condition they're in today, is that your testimony? A. I have no recollection of the condition of the minute books or how they were written. I do know that making reference to my report I found an inconsistent situation which made me believe that there was a change in the minutes.

To demonstrate that this testimony was false, the petitioner now presents the sworn affidavits of one Sophie

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Oschak, one Max Sanchez, and one Herman Brickman. Both Oschak and Sanchez were former Local 810 employees. Brickman was general counsel for the union and testified at the trial.

The affidavits of Oschak and Sanchez assert that Friedland was told by them that the Board had approved the loan and the payment to Silverman. They state that the minutes had thereafter been retyped at Friedland's direction to reflect this approval. Brickman, in his affidavit, states that he was present when Friedland was informed by Oschak and Sanchez that the Board had authorized the loan and the payment to Silverman. The petition then asserts "reference to the trial record in light of these recent revelations gives rise to the unmistakeable inference that the prosecution had reason to know of the false nature of Friedland's testimony in time to alert the defense. . . ."

More specifically, the petitioner refers to two circumstances: one is the fact that the Government granted immunity to Friedland in order to obtain his testimony; the second is the following colloquy that took place during the trial between the Court and the prosecutor:

> The Court: Do you know of any evidence, Mr. Maloney which would possibly link Mr. Friedland with the alleged fabrications of the portions of these minutes, Exhibits 3 and 5?
>
> Mr. Maloney: Yes, your Honor, I am afraid I do but it is not before your Honor or before this Court.

From this the petitioner reasons: "As the prosecutor knew of evidence indicating Jacob Friedland's involvement, it had to be evidence indicating he had a role in the change of the minutes." Silverman has attempted to position his

claim within the realm of intentional governmental misconduct because a less exacting standard of review is applied to such conduct in considering the propriety of post-trial collateral relief. *See United States* v. *Kahn,* 472 F.2d 271, 287 (2d Cir. 1973), and cases cited there.

However, it is quite clear that the Government neither knowingly used perjured testimony nor suppressed evidence helpful to the defense, knowingly or otherwise. First, the Government certainly did not know what Friedland would testify to before he took the stand. Friedland was closely involved with Silverman and his union activities, was a hostile witness who declined to confer with the Government, and gave the Government no advance knowledge of what he would say if he could be made to testify. He was extremely reluctant to testify and did his best to avoid giving any testimony. He successfully quashed a grand jury subpoena. When first called to testify at trial, he asserted an attorney-client relationship both with respect to Silverman and Local 810 as a basis for declining to answer. When this claim of privilege was rejected, he claimed protection under the Fifth Amendment and again declined to testify. These tactics completely prevented the Government from using his testimony in its direct case. Finally, Friedland was called in rebuttal at the end of the case and given immunity from prosecution under 18 U.S.C. §§ 2514 and 2516(1)(b). It was only then that he testified.

This was the first time the Government became aware of his testimony and there is therefore no factual basis for Silverman's contention that the Government offered his testimony with knowledge that it was false. Indeed, the prosecutor had no advance knowledge of it whatever.

Second, it is not at all clear that Friedland perjured himself. Silverman implies that Friedland testified that he

did not know who altered the books. But the transcript shows that he was quite careful not to go beyond saying that he had no independent present recollection of the state of the books when he first viewed them. The Government had made it clear beforehand that all it would ask Friedland was if he had made a report, if the report was based on the minute books, if the report said that there was no approval in the books for a payment and a $2,000 loan to Silverman, and whether or not that conflicted with the state of the minute books as presented at trial. The Government did not go beyond this in questioning Friedland and neither did the cross-examination. Friedland never stated that he did not know who had altered the books. His claim of a lack of present recollection has some plausibility since several years had passed between his inspection of the books and his testimony. The possibility of perjury in Friedland's testimony is not strong enough to impose a duty on the prosecutor to assume the existence of perjury and to formally notify the defense of his assumption.

This is particularly true on the facts of this case which make it far more probable that Silverman would have known if Friedland had perjured himself than that the Government would have known. Silverman was the dominant and controlling figure in Local 810. As the prosecutor notes in his affidavit, and as was evident to the Court during the trial, most of the witnesses called by the Government, including Friedland, were under the domination and control of Silverman. The same was true of union employees whom the Government sought to question but who did not testify at trial, such as the two former union employees who have submitted affidavits in support of Silverman's petition. Silverman had hired Friedland to inspect the books and Friedland sent a copy of his report of that inspection to Silverman.

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In the same vein, the Government cannot be said to have suppressed evidence of Friedland's role, if any, in the alteration of the books. Counsel for the union and for Silverman as well as Friedland's own counsel sought to avoid Friedland's testimony. After assertions of attorney-client privilege both with respect to Silverman and Local 810 were rejected, Friedland claimed protection under the Fifth Amendment. There was a lengthy colloquy on this claim, participated in by all three counsel mentioned, which included the prosecutor's statement of the possibility of a link between Friedland and the alteration of the books. The claim of privilege was sustained on the basis of this statement.[1] Thus the existence of such evidence was well known to Silverman. He, nevertheless, did not request its disclosure or in any way seek to use it at trial. His present volte-face is nothing more than an attempted reversal of a tactical decision made at trial.

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[1] The Court: I prefer to be on safe ground. What concerns me is the doctrine of the link in the chain of evidence. This link in and of itself is not incriminating. Nobody could possibly persuade me that it is incriminating, and I am sure that Mr. Friedland's testimony would not in itself be incriminating. And because it would not incriminate and because it would not incriminate anybody but the defendant or persons in league with him on this charge of fabrication, I have declined to sustain this claim of privilege under the Fifth Amendment on the ground that it does not protect him from incriminating third parties. But what makes me hesitate was your answer to my question as to whether he was a target on the basis of other evidence, and when you answer that question in the affirmative, you placed me in a position where I am afraid I have to sustain his claim of privilege, because I can't tell what a future investigator, another United States Attorney might possibly do in linking this separate and independently unincriminating evidence with other and possibly incriminating evidence in a chain of events that might constitute a possible case against Mr. Friedland, and I certainly don't want to be a party to any procedure which would deprive him of his rights under the circumstances.

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Absent governmental misconduct, the standard of review that Silverman must meet in order to obtain relief is that the evidence which he alleges was previously undiscovered must have been discovered after trial, must be material to the factual issues at the trial and not merely impeaching or cumulative, and it must be of such a character that it would probably produce a different verdict in the event of a retrial. *United States* v. *Kahn,* 472 F.2d 272, 287 (2d Cir. 1973); *United States* v. *De Sapio,* 456 F.2d 644, 647 (2d Cir. 1972); *United States* v. *Polisi,* 416 F.2d 573, 576-77 (2d Cir. 1969). Assuming that Friedland did perjure himself, the standard of review that a challenge based on perjured testimony must meet was recently stated in *United States* v. *Stofsky,* 527 F.2d 237, 246 (2d Cir. 1975):

> Upon discovery of previous trial perjury by a government witness, the court should decide whether the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's witness.

The affidavits that contain the allegedly newly-discovered evidence and seek to establish perjury on the part of Friedland come from two employees of the union with which the petitioner Silverman was intimately connected at the time of the trial, and from his union's attorney, Brickman. The two employees of the union, as well as Brickman, who actually testified at the trial, were clearly available to the petitioner before and during the trial and no claim can validly be made that their testimony is

recently discovered. Additionally, even if it be assumed that their testimony was recently discovered, its sole effect would be to impeach Friedland, a witness with close ties to Silverman and clearly hostile to the Government. Counsel for Silverman never attacked the veracity of Friedland and on summation suggested to the jury that he was mistaken. There is neither solidity or persuasiveness in any of the affidavits submitted by Silverman to support the charge that Friedland perjured himself.

The testimony contained in these affidavits is not necessarily exculpatory with respect to Silverman and it would be utterly inconceivable to conclude that even if Friedland were shown to have directed the alteration of the books that that would have had the probable effect of changing the jury's verdict or that it would have the probable effect of a different verdict on retrial. Even if Friedland caused the minutes to be altered, it cannot be assumed that he did not do it at the direction, explicit or implicit, of the defendant Silverman who had hired him as counsel on behalf of the union to respond to the grand jury subpoena. *See United States* v. *Stofsky, supra,* 527 F.2d at 247. The alteration of the books was of central importance to Silverman. Friedland's reason to alter them, if he did, could only have been to please his employer, Silverman. The jury in this case was charged: "There is no evidence in this case linking any action of the defendant with the alleged fabrication." Yet there was circumstantial evidence from which the jury concluded that Silverman was responsible for that fabrication. It is highly improbable that further evidence as to the individuals who actually supervised and performed the fabrication would lead to a different conclusion.

THE TESTIMONY OF PAUL CHLYSTUN

The essence of Silverman's claim of error is that had the Government probed more deeply into the facts concerning the disposition of an air-conditioner, it could have determined that Chlystun lied and that the air-conditioner was the property of the contractor. Chlystun's testimony was that Silverman instructed him to sell the air-conditioner and that the cash proceeds from the sale were delivered to Silverman. Everything the Government is charged with faliing to do could conveniently have been done by Silverman. At the trial the credibility of Chlystun was sharply attacked and Silverman called a number of witnesses with respect to the alleged true value and ownership of the air-conditioner. A petition under 28 U.S.C. §2255 may not be employed to relitigate issues already adjudicated on trial or appeal. *United States* v. *Thompson,* 261 F.2d 809 (2d Cir. 1958); *Meyers* v. *United States,* 446 F.2d 37 (2d Cir. 1971). All Silverman is saying is that he is now prepared to litigate the air-conditioner issue using different tactics. The Government cannot be faulted under such circumstances. The suggestion is utterly without validity.

THE AUTHORSHIP OF EXHIBIT 47

Relevant to intent and necessary to the Government's case in order to counter the anticipated defense that the expenditures were authorized and for the benefit of the unions, was the evidenec of Silverman's domination and control of the unions. To demonstrate this control the prosecution introduced a notice (Government's Exhibit 47) which had been directed to all delegates and organizers, and

posted for their attention while the union was under grand jury investigation: It read:

> "If you are approached by any Federal investigators do not give them any information. Refer them to our attorney Mr. Shivitz.
>
> "Anyone disregarding these orders will be *summarily terminated.*"
>
> "Milton Silverman"
>
> (emphasis in original)

The petitioner now asserts that the prosecution ignored one important consideration when it used this piece of evidence at trial, namely that these were not the words of Milton Silverman. In support of this claim petitioner presents the affidavit of an ex-employee of the union who states that he prepared the notice and that he inserted the final sentence of the notice containing the threat of termination. He says it was done without consulting Milton Silverman. Petitioner also submits corroborating affidavits of a union attorney, David I. Shivitz and of another union employee who typed it. Here again the petitioner seeks to relitigate a matter on the basis of facts he obviously knew. This allegedly new evidence was known, assertedly, by two union employees who could have been called, and by Shivitz who attended the trial and who testified as a character witness for Silverman.[2]

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[2]Shivitz was indeed an active participant in the trial and gave every indication of a highly partisan interest.

Shivitz engaged the Court in a prolonged and painful attempt to prevent the Court from obtaining or inspecting the Friedland report. Shivitz even went to the extraordinary length of claiming the report was "under seal" and that it should not even be marked for identification. The seal, it developed, was his own. Additionally, there

But the argument falls of its own weight because Silverman himself testified about Exhibit 47 when he was confronted with it on cross-examination and he sought to repudiate the second paragraph as well as his general responsibility for it. His testimony is as follows:

> "Q. I show you 47 for identification. Have you ever seen a copy of that before? A. Yes, sir. It was shown to me sometimes. I have seen it before.
>
> Mr. Rogge: May I see what we are talking about?
>
> Mr. Maloney: In a moment, counsel. A few more questions as a foundation.
>
> "Q. Did you issue that directive as it indicates? A. I don't know whether I issued that. It was shown to me.
>
> "Q. You approved it? A. I don't know whether I approved it or not."
>
> • • •
>
> "Q. About that time you were familiar with such a document like this existing? Is that correct? A. Not the document, the thought.
>
> "Q. The thought? A. The thought, but I didn't have any knowledge of the last clause. I think someone was overzealous.

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was evidence at the trial that Shivitz and his firm had received substantial legal fees from the unions and from the successful borrowers of the union funds. If Government Exhibit 47 had indeed been prepared and posted without Silverman's knowledge or consent, and Shivitz knew it, it is inconceivable that he would have failed to testify about it. The conclusion is inescapable that whatever he knew about Government Exhibit 47 was not considered to be sufficiently important to be mentioned at trial or that he was fully aware of Silverman's testimony which covered the very point and which is now sought to be raised again at this late date.

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> "Q. Is that the only part you take objection to? A. I did not construct this nor did I sign this notice and I don't know where this notice was posted or to whom it was given, but this is—I would say the first paragraph are my sentiments and my suggestions to the employees when they asked us what if they are interrogated, I told them to see their attorney, Mr. Shivitz."

Having thus placed the issue before the jury by his own testimony, and the testimony having been obviously rejected by the jury, he cannot now burden the Court with it as a basis for this petition. This contention of Silverman's is a gross imposition on the Court.

Motion denied in all respects. It is so ordered.

Edward L. Palmieri

EDWARD L. PALMIERI
U.S.D.J.

Dated: New York, N. Y.
May 5, 1976